



IRCP

Institute for International Research on Criminal Policy
Ghent University

Prof. Dr. G. Vermeulen – Schengen co-operation (part 2) – Police Master – Tallinn, 26 April 2007

Schengen co-operation

New developments

Prof. Dr. Gert Vermeulen

Police Master - Comparative Criminal Justice Systems
Tallinn, 26 April 2007



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Structure

- > SISII
- > Prüm Treaty
- > principle of availability
- > questions & discussion



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SISII

- > technical upgrade
- > new functionalities
 - > explorative, non-exhaustive oral presentation & discussion
- > delivery: end of 2008?



Prüm Treaty (1)

- Convention between 7 EU MS, among which the founders of Schengen (“Schengen III”)
 - Benelux countries, France & Germany + Austria & Spain
 - 7 is below the number of MS required for “closer or enhanced” cooperation
 - = no less than mere intergovernmental deepening exercise
- on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration
- signed in Prüm (Germany) on 27 May 2005
- entered into force in Austria and Spain on 1 November 2006, as it did in Germany on 23 November 2006. Luxembourg ratified the treaty at the end of December. The other signatories are also making efforts to have the treaty ratified by spring 2007
- Finland, Italy, Portugal and Slovenia intend to accede



Prüm Treaty (2)

- contents (no systematic slides)
- “For example, under the treaty Austria and Germany have been able to check the contents of their national DNA databases against each other since early December 2006. This is the first time that two countries have granted each other access to their national police databases using a hit/no hit method. In just six weeks, when German untraceables were checked against the Austrian database, 1500 matches were found, and when Austrian untraceables were checked against the German database, 1400 matches resulted”



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Principle of availability (PoA)

- IRCP proposal to the European Commission
- Commission proposal to the Council
- latest political developments
- open discussion (permanent)



Structure

1. aim, background and context
2. Methodology
3. current situation re cross-border exchange of LE information
4. theoretical principles
5. practical implementation
6. relationship with existing LE channels/bodies
7. access for third states?



1. Aim, background and context

- The Hague Programme November 2004
 - principle of availability
- Communication Commission (COM 429 final of 16.6.2004)
 - full stock-taking exercise ➤ tender DG.JAI/D1/2004/001
- Swedish initiative for a draft Framework Decision
- other related work in progress
 - police access to VIS
 - Schengen III (Prüm)
 - third pillar instrument on common data processing standards



2. Methodology

- > research team
- > review national, bilateral and multilateral law and policy instruments
- > bilateral working meetings
 - > European Commission, NGO's
- > round-tables (based on reflection paper)
 - > ELO-network + Europol
 - > human rights and data protection NGO's/bodies
- > final report
 - > available in book-form to all partners



3. Current situation re exchange of LE information

6 main obstacles and their solution in the current proposal

- > exchange of information dependent on 'goodwill'
 - > obligation to make information available
- > differences in conditions of access
 - > conditions of requesting state dominant
- > no efficient mechanism to know whether information is available
 - > creation of new European index system (ELESIS)
- > no uniform procedure for requesting and obtaining information
 - > use of a standardized and simplified procedure
- > direct exchange of information still exception
 - > direct exchange general rule
- > differences in data protection rules
 - > sufficient data protection regime and control



4. Theoretical principles

- a. law enforcement authorities
- b. conditions for “equivalent” access
- c. available information
- d. direct exchange of information
- e. use of information
- f. data protection regime
- g. control - traceability



a. Law enforcement authorities

- traditional distinction police (and customs) and judicial cooperation maintained
 - law enforcement authorities: police and customs
- state security and secret intelligence services not included
 - purpose limitation

b. Conditions for “equivalent” access (1)

- > two options
 - > access under conditions of requested MS
 - > limited added-value
 - > preferred option: mutual recognition
 - > national legislation requesting MS primary criterion
 - > first application mutual recognition in field of police cooperation
 - > no harmonization of access conditions required
- > legitimate request: three conditions
 - > competent LEA
 - > i.e. for prevention, detection, repression of -/criminal intelligence operation relating to serious offences
 - > having autonomous access to such information in own MS
 - > serious offence (32+ list of EU core crimes: EAW, EEW)



b. Conditions for “equivalent” access (2)

- > grounds for refusal
 - > essential national (security) interests or “ordre public”
 - > success current investigation/criminal intelligence operation could be jeopardized
 - > requested information not autonomously accessible by LEA of requested state
 - > ne bis in idem
- > “pre-evidence warrant” (+ certificate)



c. Available information

- all information available to LEA of requested MS in
 - own databases
 - other public databases
 - first stage: limited to certain types, such as
 - traditional personal identification items (name, alias, ...)
 - DNA
 - fingerprints
 - ballistics
 - vehicle registrations
 - telephone numbers ...
- already existing information
 - no action needed
 - not info in real time



d. Direct exchange of information

- > preferred option
 - > time saving
 - > relieve workload national units
 - > indirect exchange back-up option
- > three categories of information
 - > autonomous access in requesting and requested MS
 - > direct exchange possible
 - > judicial authorization required in requested MS
 - > judicial authority may refuse
 - > no autonomous access in requesting state
 - > no direct exchange possible
- > language problems



e. Use of information

- > “for law enforcement use only”
 - > not as evidence
 - > not for state security
 - > unless immediate and serious threat to public security
- > specialty
 - > only for any of the serious offences (list)
- > violation of purpose limitation
 - > civil liability, case unlawful?
- > forwarding by requesting/receiving MS
 - > to other MS under same conditions
 - > to third states/bodies
 - > idem + dependent on adequacy data protection regime



f. Data protection regime

- > essential part
- > third pillar instrument under negotiation?
- > European acquis
 - > minimum standard
- > control by national data protection authority



g. Control - Traceability

- > logging in requested state
 - > verification (e.g. defense)
- > control in requesting state (certificate)
 - > all information requested > stored
 - > information used > criminal file



5. Practical implementation

- a. two modalities
- b. European Law Enforcement Services Index System (ELESIS)
- c. confidentiality



a. Two modalities

- > “need to know”
- > direct access
 - > language- and IT problems, security, financial cost
- > indirect access to index: two options
 - > index integrated with national databases
 - > security?
 - > creation of European index system (ELESIS)



b. European Law Enforcement Services Index System

- > “ELESIS”
- > search index on certain fields
 - > identification persons, DNA, fingerprints, ballistics, vehicle registration, telephone numbers
 - > hit > MS where available + contact info LEA
- > “pre-evidence warrant” issued (+ certificate)
- > obligation to provide and label “for LE use only”



c. Confidentiality

- each MS responsible for classification
- Europol classification levels
 - unclassified
 - restricted, confidential, secret, top secret
- to be respected by requesting MS



6. Relationship with existing LE channels/bodies

- > Europol
 - > core activity: organized/serious international crime
 - > access/no simple forwarding based on bilateral agreements
- > bilateral/multilateral agreements
 - > more favorable provisions not affected
- > Schengen/SIS
 - > different goals/geographical scope(s)
- > OLAF
 - > no access? (purpose limitation)
- > national judicial authorities
 - > access
- > Eurojust
 - > no access? (indirectly, via national level)



7. Access for third states?

- police cooperation between EU and third states
- ELESIS access dependant on bilateral agreement EU-third state?
 - based on Articles 24 and 38 TEU
 - data protection (purpose limitation)



Commission proposal to the Council

- > largely based on IRCP proposal, but
 - > mutual recognition mitigated by “equivalent access” principle
- > comments
- > still too ambitious to be adopted before 2008
- > also too strongly linked to draft FD data protection in police and judicial cooperation in criminal matters
- > as a result: ...



Latest political development

- Germany EU Presidency proposal
 - for a Council on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime
 - available as a separate document
- copying the essence of the Prüm Convention into an EU instrument, to be adopted in 2007
 - with omission 1st pillar-linked provisions
 - and Schengen-development-linked provision (separate)
 - comparison available as a separate document
 - without the need for the instrument to be ratified
 - immediate entry into force
 - two-year implementation period as from mid-2007?